Gardner v Northern Territory of Australia [2004] NTCA 14

PARTIES:	GARDNER, Kelvin Ian
	v
	THE NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP29 of 2003 (20107821)
DELIVERED:	10 December 2004
HEARING DATES:	18 October 2004
JUDGMENT OF:	MARTIN (BR) CJ, ANGEL & MILDREN JJ

CATCHWORDS:

TORTS

Negligence – duty of care – whether respondent under a duty to take adequate precautions to reduce likelihood or intensity of the fire – whether respondent under a duty to take reasonable precautions to control or reduce the spread of the fire – reasonable precautions - whether duty discharged – appeal dismissed

Dovuro Pty Limited v Wilkins and Others (2003) 215 CLR 317, pp 329 – 330; applied
Hargrave and Others v Goldman (1963) 110 CLR 40; *Bernie Port Authority v General Jones Pty Limited* (1994) 179 CLR 520; considered

REPRESENTATION:

Counsel:

Appellant:	A Wrenn
Respondent:	L Sylvester

Solicitors:

Appellant:	TS Lee & Associates
Respondent:	Department of Justice, Northern Territory

Judgment category classification:	B
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Gardner v Northern Territory of Australia [2004] NTCA 14
No. AP29 of 2003 (20107821)

BETWEEN:

KELVIN IAN GARDNER
Appellant

AND:

THE NORTHERN TERRITORY OF AUSTRALIA
Respondent

CORAM: MARTIN (BR) CJ, ANGEL & MILDREN JJ

REASONS FOR JUDGMENT

(Delivered 10 December 2004)

Martin (BR) CJ:

Introduction

[1] This is an appeal against a decision of a Judge of this Court dismissing the appellant's claim for damages arising out of the escape of a fire from vacant Crown land onto the property jointly owned by the appellant and members of his family. The trial Judge found that although the respondent owed a duty of care to the appellant, the evidence had not established that the respondent was in breach of that duty. The grounds of appeal, which are poorly drafted, essentially complain that the learned trial Judge erred in his

assessment of the evidence and in his findings that the evidence did not establish a breach of duty by the respondent.

[2] The fire occurred on 10 September 1995. At that time the appellant, two of his brothers and his sister were registered as the joint owners of land situated at Section 1746 Hundred of Cavenagh. In about 1987 the appellant constructed on Section 1746 a dwelling which the trial Judge described as "rudimentary". The appellant's brothers and sister were not parties to the proceedings. For ease of reference I will refer to Section 1746 as the appellant's land and discuss the duty of the respondent as a duty owed to the appellant.

[3] The appellant's land is in a relatively remote location surrounded by vacant and largely inaccessible land. Annexed to these reasons is a copy of part of a map tendered as an exhibit which covers the relevant area.

[4] The Crown land from which the fire escaped is immediately to the north of Sections 1746 and 1747. The appellant and the same members of the family owned Section 1747 which is adjacent and to the west of Section 1746. To the south of Section 1746 is Section 1742 which was also owned by the same members of the appellant's family. Cox Peninsula Road is a short distance south of the southern boundary of Section 1742. Each section was 320 acres in area.

[5] The land to the north of Sections 1746 and 1747, which I have described as Crown land, was owned by the Conservation Land Corporation and was

under the management and control of the Parks and Wildlife Commission. The Corporation and Commission are independent statutory authorities under the Parks and Wildlife Commission Act and the Conservation Land Corporation Act. The role of the Bush Fires Council, a statutory body established under the Bush Fires Act, was also relevant. At trial the respondent agreed that it could be sued because, for these purposes, those entities were agencies of the Crown.

Pleadings

[6] By its pleadings, the respondent admitted that it owed a duty to the appellant in the following terms:

> "The respondent was under a duty of care to take such precautions to restrain fire on its land from escaping onto the [appellant's] premises and causing damage as were reasonable in all the circumstances then prevailing."

[7] At trial that statement was accepted, correctly in my view, as an accurate statement of the respondent's duty: *Hargrave v Goldman* (1963) 110 CLR 40; *Burnie Port Authority v General Jones Pty Limited* (1994) 179 CLR 520. At issue were the content of that duty in all the circumstances and whether the appellant had established that the respondent had failed to discharge that duty.

[8] The appellant based his case on two fundamental propositions. First, that the respondent was under a duty to take adequate precautions to reduce the likelihood of fires or intensity of fires and failed to do so. Secondly, that

once the fire was in existence on Crown land, the respondent failed to discharge its duty to take reasonable precautions to control or reduce the spread of the fire and, in particular, to prevent it from escaping onto the appellant's land.

[9] As to the first head of the duty, the appellant claimed that prior to the advent of the fire the respondent was under a duty to implement and maintain fire breaks and to reduce, by back burning, the build up of fuel on its land to the north of Sections 1746 and 1747. It was common ground that in years prior to 1995 the respondent undertook back-burning operations along the northern boundary of the appellant's land. It was the case for the appellant that failure to undertake such precautions in 1995 was a breach of the duty owed to the appellant.

[10] As to failing to control or prevent the spread of the fire once it was known to be in existence on Crown land to the north of Sections 1746 and 1747, in substance the appellant advanced the following matters as amounting to breaches of duty:

(i) Failure to advise or warn or adequately advise or warn the appellant about the location of the fire.

(ii) Failure to advise or warn or adequately advise or warn the appellant about the movement of the fire.

(iii) Failure to adequately monitor the movement of the fire in order to advise or warn the appellant of its location.

(iv) Failure to prevent the spread of the fire by back-burning into the fire either before the fire approached the northern boundary of Section 1746 or as it approached and was proximate to that boundary.

[11] In response, the respondent pleaded, and set out to establish in evidence, a number of circumstances in which the content of the respondent's duty of care was to be determined. In addition, the respondent pleaded particulars of the reasonable acts which it said were carried out by the respondent and which discharged its duty. Those pleadings were as follows:

> "**Particulars of circumstances**
>
> (a) Bushfires were an annual occurrence on Crown Land in, inter alia throughout the Northern Territory, the Hundreds of Ayres, Cavenagh, Colton and Strangways, generally within the Litchfield Shire.
>
> (b) Such bushfires occurred naturally by lightning strikes, and unnaturally by human intervention and very regularly;
>
> (c) Crown Land in the Hundred of Ayers between Haycock Reach and the Blackmore River on the east and Middle Arm on the west and adjoining the northern boundary of Sections 1746 and 1747 was remote, uninhabited and generally inaccessible for fire prevention and control purposes;
>
> (d) Save for bush style residences and associated outbuildings on Section 1742 and the premises, the plaintiff believes there were no other residential buildings and sheds situated and in use on any of the sections in the Hundred of Ayers north of Cox Peninsula road and west of the Blackmore River and Haycock Reach ("the locality");

(e) The locality was not in any area gazetted as within the operating areas of a Volunteer Bushfire Brigade;

(f) Contrasted with the locality, land in the Hundred of Ayers east of the Blackmore River/Haycock Reach and in the Hundreds of Cavenagh, Colton and Strangways ("the region") was a closely settled rural residential area or conservation and wildlife and park reserves with significant farms, buildings and other public and private infrastructure, throughout which was interspersed, land under the control or ownership of the Crown;

(g) Crown Land in the locality was generally inaccessible to Volunteer Bushfire Brigades and the Bushfires Council for fire prevention, control and management purposes other than along fire access tracks on private property boundaries;

(h) Volunteer Bushfire Brigades in the region and the locality were unable to extinguish fires on Crown land in the locality other than by backburning from fire access tracks;

(i) The Bushfires Council sought to protect lives and property from bushfires in the region and the locality by

(i) public awareness campaigns directed at landholders having and maintaining fire access tracks along their property boundaries and creating and maintaining fire breaks and removing fuel load material around and adjacent to houses, sheds, orchards and other property infrastructure; and

(ii) in the case of the region installing fire access tracks around the boundaries of Crown land.

(j) Volunteer Bushfire Brigades provided at a local level:

(i) early dry season burning off programs on Crown Land and road reserves;

(ii) assistance to landowners at their request for burning off and fuel load reduction on private property;

(iii) on call assistance to property owners in the event of threatening fire to back burn in the face of fire and where necessary fight fires around endangered property;

(k) Volunteer Bushfire Brigades in the region and the locality attempted to prevent bushfires from burning persons and property by the provision of the services referred to in the immediately [sic] sub-paragraph;

(l) Fire access trails on property boundaries do not and cannot prevent all bushfires. Their purpose is to provide access for fire fighters and fire fighting vehicles and heavy equipment to be placed in the way of approaching fire for grading, back burning and other fire fighting purposes;

(m) It was and remains unrealistic, dangerous to fire fighters and beyond the financial and other resources of the Crown to reduce fuel loads and fight fires on Crown Land because:

(i) of the large areas involved;

(ii) Crown Land in the locality is variously rough, rocky, boggy, swampy and wet and comprised by areas of black soil, open savannah, paperbark or eucalypt woodland and not susceptible to permanent fire access trails of suffivient (sic) number and area coverage;

(iii) fire fighters are endangered without vehicular escape routes when fighting fires or backburning;

(iv) of the uncontrollable nature of fires and in particular a propensity to jump large distances over burnt and cleared area, fire access trials;

(v) of the cost involved relative to the measures referred to in sub-paragraphs (i) and (j) above;

(vi) fire is an integral part of the Northern Territory environment and landscape.

(n) Fire protection and management in the region and the locality depends upon residents having high levels of awareness of the risks of fire and conducting themselves and their property in a way that ensures maximum co-operation with the Bushfires Council and the Volunteer Bushfire Brigades and creating the maximum possible protection from fire having regard to all the circumstances prevailing from time to time. In particular, the Bushfires Council and the Volunteer Bushfire Brigades depend upon residents to maintain high vigilance at times of fire danger and to call for assistance when it is needed to protect persons and property from loss and damage.

(n) All rural residents in the region and the locality including the plaintiff as a long time resident thereof know or should know the matters set out in particulars (a) to (n) above.

Particulars of reasonable acts taken in the circumstances

(o) Berry Springs and Darwin River Volunteer Bushfire Brigades and the plaintiff were aware of and monitored a fire burning on Crown Land well north of the premises in days preceding 10 September 1995;

(p) The plaintiff was aware of the fire;

(q) Roy Baxter of Berry Springs Volunteer Bushfire Brigade and the plaintiff had conversations on 9 and 10 September 1995 concerning the fire and agreed to monitor its progress. On those occasions, the plaintiff and Baxter agreed and understood that the fire was well north of the premises and not presently endangering them.

(r) In the morning of 10 September 1995 Baxter attended upon the plaintiff at his house on Section 1742. Both could see the fire well to the north of the premises. Both agreed that if the fire crossed Daly's Creek the premises might become endangered and assistance of the Volunteer Bushfire Brigades would be called for and provided;

(s) Baxter awaited the plaintiff's call for assistance should it have become necessary;

(t) Fire fighting units were available to assist the plaintiff on call;

(u) Baxter relied upon the plaintiff to have good fire access tracks and internal roads and areas around the buildings and improvements on the premises which were cleared of fuel and other flammable material.

(v) Baxter relied on the plaintiff to call for assistance when and if it became necessary"

Findings as to Witnesses

[12] Before canvassing the evidence and facts, it is convenient to discuss findings made by the trial Judge as to the credibility and reliability of a number of witnesses. In particular, the findings as to conflicts between the appellant and a member of the Berry Springs Volunteer Bushfire Brigade, Mr Roy Baxter, are significant. His Honour preferred the evidence of Mr Baxter to that of the appellant.

[13] Counsel for the appellant attacked the findings of the trial Judge with respect to the credibility and reliability of Mr Baxter. In essence, counsel submitted that notwithstanding the well known constraints on an appellate court, this Court should find that the trial Judge erred in accepting the evidence of Mr Baxter in preference to that of the appellant.

[14] At the time of trial in November 2003 Mr Baxter was suffering memory loss diagnosed as an early stage of Alzheimer's disease. The trial Judge had the assistance of reports and evidence from a Community Geriatrician with the Aged Care Assessment Team at the Department of Health, Dr Sadhana

Mahajani, who had been treating Mr Baxter since April 2003. The trial Judge summarised his findings as to Mr Baxter as follows:

> "Dr Mahajani said that, although Mr Baxter suffered from short-term memory loss, his longer term memory was unaffected at this time save for the confusion he may suffer when under pressure. She said Mr Baxter might become confused under the pressure that would result from giving evidence in a court and that he would find it difficult to provide details in those circumstances. This turned out to be so. He was able to provide a fairly clear picture of what he says occurred at the time of the fire but when pressed on particular matters he either said he did not know or retreated into silence. He said that it was easier for him to remember things when he was in a quiet room during the interview process and was able to take time to think. That was not the case in court. In her evidence Dr Mahajani said such a reaction was what she would have expected.
>
> I found Mr Baxter to be an honest witness doing his best to be helpful. He impressed me as a careful man who was diligent about his duties. Mr Whatley confirmed the view that Mr Baxter was a "most diligent" volunteer. Unfortunately he became confused in cross-examination even though that cross-examination was conducted in a sensitive fashion. I have no difficulty in accepting the evidence contained in his affidavit."

[15] As to particular conflicts between the appellant and Mr Baxter, the trial Judge preferred the evidence of Mr Baxter. His Honour found that the appellant "demonstrated a capacity to reconstruct his evidence in the face of difficulties that confronted him." Of Mr Baxter, his Honour said:

> "On the other hand, I found Mr Baxter to be a careful and honest witness who was reliable until placed under pressure in the court room. As his time in the witness box increased he tended to agree with propositions put to him and to resort to silence or a response that he could not remember. I do not regard him as a less reliable witness for those reasons but rather recognised that as being an expected consequence of the illness from which he now suffers."

[16] In my opinion, the appellant has not demonstrated any basis upon which this Court could properly interfere with the findings of the trial Judge. There was nothing inherently unlikely in the evidence of Mr Baxter. Nor was it contradicted by other evidence in the case which could or should have given cause for concern as to the reliability of Mr Baxter's evidence. The trial Judge paid careful heed to the difficulties associated with Mr Baxter's condition. Other than a general appeal based on Mr Baxter's condition and a contention that Mr Baxter was unwilling to give any answers favourable to the appellant, counsel was unable to identify any basis upon which this Court should interfere with the findings of the trial Judge. Having considered the evidence, in my opinion there is no basis upon which this Court could properly interfere with the findings.

[17] The appellant called an expert witness, Mr John Bird. The trial Judge accepted that Mr Bird possessed expertise in relation to bush fires. However, his Honour rejected some of the opinions given by Mr Bird. In my opinion, there was ample basis upon which his Honour could reach his conclusions with respect to the evidence of Mr Bird and there is no basis upon which this Court could properly interfere with those findings.

Chronology of Events

[18] The fire escaped from Crown land to the north of Section 1746 and entered Section 1746 moving in a general southerly direction at somewhere around 3pm on 10 September 1995. The fire was first brought under observation on

9 September 1995 by Mr Baxter and Mr Piddick of the Berry Springs Volunteer Bushfire Brigade and Bruce and Rick Greaves of the Darwin River Volunteer Brigade.

[19] Blackmore River is an extension of Middle Arm and, in the area of relevance, travels substantially in a north-south direction to the east of both Section 1746 and the Crown land to the north of Section 1746. On 9 September 1995 from areas northeast of Section 1746 and east of Blackmore River, Mr Piddick and the other volunteers endeavoured to pinpoint a fire in the Berry Springs area. After checking areas behind the Berry Springs Nature Park and the Wildlife Park, from Section 1612 they observed smoke on the western side of Blackmore River on Crown land to the north of Section 1746. Mr Piddick described the smoke rising from the fire "as looking like an atomic bomb had gone off".

[20] On 9 September 1995 Mr Baxter drove to the dwelling on Section 1746 where he spoke to Mr Gardner. Mr Baxter's affidavit as to that conversation, accepted by the trial Judge as accurate, was as follows:

> "I spoke to Mr Gardner about the fire, smoke from which I could see to the northwest of Daly's Creek [a creek which ran through Section 1746]. I not recall Mr Gardner's exact words, but he advised me to the effect "as far as I can see it will stay the other side of the creek". Mr Gardner did not appear to be worried about the fire. I agreed with his assessment. In my opinion it was not then a threat to the Property [the appellant's property being Sections 1746, 1747 and 1742].

> It would have been very difficult to fight the fire in any event, as the terrain to the north of the property is quite inaccessible by vehicle. However, Mr Gardner did not ask for any help to extinguish the fire."

[21] The appellant said that on 9 September 1995 he saw smoke to the north. He denied, however, that Mr Baxter attended on 9 September and spoke with him about the fire. As I have said, the trial Judge accepted the evidence of Mr Baxter.

[22] During the evening of 9 September 1995 the appellant and Mr Baxter had an informal conversation at the Winnellie greyhound track where the appellant's dogs were racing. According to the appellant he asked Mr Baxter where the fire was located and was told that "the fire is on the other side of the Blackmore River". The appellant said he assumed that meant the fire was on the eastern side of Blackmore River. Mr Baxter had no memory of the conversation.

[23] Against the background of the uncontested evidence that Mr Piddick, Mr Baxter and others had made observations on 9 September 1995 from a position to the east of the Blackmore River and had observed smoke from the fire to the west of the Blackmore River, and in view of the evidence given by an expert witness to the effect that it was most unlikely that there had been a fire on the eastern side of the river in the relevant location at the relevant time, the trial Judge rejected the evidence of the appellant that Mr Baxter told the appellant that the fire was on the eastern side of the river. His Honour was satisfied that if the appellant thought the fire was on

the eastern side of the river, being the opposite side to Section 1746, that view could only have resulted from a misinterpretation of information given to him by Mr Baxter at the greyhound track. That was a finding open to his Honour and I am unable to discern any basis in the evidence which would justify this Court interfering with that finding.

[24] Regardless of any misinterpretation of what Mr Baxter said, the appellant said that at about 9am or 10am on 10 September 1995 he attended at Section 1746 to check the location of the fire. He could see smoke indicating an actively burning bush fire to the north and northwest of Daly's Creek. The appellant formed the view that the fire was nowhere near the house so he travelled to stables situated near the southern boundary of Section 1742.

[25] Notwithstanding his evidence that he was generally alert to the threat of bushfires in the dry season and that he was aware that if a fire was situated to the northwest of Section 1746 there was the potential for it to spread to his land, the appellant said he was not as vigilant as he should have been because Mr Baxter had told him the fire was on the other side of the river, meaning the eastern side. Having regard to the evidence given by the appellant as to his observations on the morning of 10 September 1995, and in particular to the markings placed by the appellant on a plan, the trial Judge rejected the appellant's assertion that he thought the fire was on the eastern side of the river in the hours leading up to the spread of the fire onto the appellant's property. That was a finding open to his Honour.

[26] According to the uncontested evidence of Mr Bruce Greaves, during the morning of 10 September 1995 in company with other members of the volunteer brigade including Mr Baxter, he attended at a fire burning along the northern side of Cox Peninsula Road to the west of Blackmore River and to the south of the appellant's property. A watch was maintained on the fire which included driving along the southern boundary of Section 1742 to check that the fire did not burn back into the appellant's property. Mr Greaves could see smoke rising "far off to the north". When he asked Mr Baxter about the smoke, Mr Baxter said words to the effect "that's up in that swamp country" meaning Crown land to the north of the appellant's property.

[27] Although denied by the appellant, the trial Judge accepted the evidence contained in Mr Baxter's affidavit that at about midday on 10 September 1995, Mr Baxter attended at the stables on Section 1742 for the purpose of checking the location of the fire. He could see the smoke and assessed that the fire was still north of Daly's Creek. According to Mr Baxter, the following occurred:

> "I do not recall Mr Gardner's exact words, but he advised me to the effect "it'll be right mate, don't worry about it". I replied in words to the effect "if you think it's safe that's fine by me."

[28] Mr Baxter said that if he had been contacted by the appellant that afternoon and advised that the appellant was concerned that the fire was a direct threat

to the appellant's property, he would have attended to assist in controlling the fire.

[29] The plaintiff agreed that nothing he could see about the fire to the north at about midday on 10 September 1995 caused him any concern.

[30] After midday the appellant spent his time in the stables on Section 1742. It was somewhere around 3.30pm when the appellant's son alerted him to soot in the air and the appellant observed smoke rising from an area near to Section 1746. He drove to the house on Section 1746 and found the land had been burnt and the house was burning.

[31] There is no evidence that members of any bushfire brigade made observations of the fire after midday on 10 September 1995. It appears that Mr Baxter and Mr Piddick were involved in a controlled burn in the Darwin River area at around 4pm that day, but there is no positive evidence as to whether Mr Baxter and others were engaged in specific duties related to bushfires between 12 noon and 3pm.

[32] The trial Judge found that after Mr Baxter had met the appellant at the stables on Section 1742 at about midday on 10 September 1995, both Mr Baxter and the appellant expected the appellant to maintain a watch on the fire. It was also common ground that had the appellant called for assistance, the Berry Springs Bushfire Brigade would have immediately abandoned other activities and gone to his assistance.

Weather Conditions

[33] On a daily basis the Bushfires Council received by facsimile from the Australian Bureau of Meteorology fire weather forecasts for each of the fire controlled regions. Those forecasts included a fire danger index (FDI) calculated by the Bureau using a formula containing a number of factors including grassland curing, fuel loadings, temperature and relative humidity. The possible range of the fire danger index is between one and fifty.

[34] The report from the Bureau of Meteorology also included a fire danger rating (FDR). That rating ranged from low to moderate, high, very high and extreme.

[35] On 9 September 1995 the forecast issued by the Bureau of Meteorology for Darwin was as follows:

"Darwin		Noon	3 pm
Max Temp	:	30	31
Wind KPH	:	290/15 WNW	350/20 N
Max Gust	:	23	30
Min RH %	:	62	49
FDI	:	Mod 6	HIGH 11
Weather	:	Fine."	

[36] According to the affidavit of Mr Whatley, a Regional Fire Control Officer, the conditions forecast indicated "mild variable winds with direction changing in the afternoon." Mr Whatley described the FDR and FDI as moderate 6 at noon and high 11 at 3pm. He then expressed the following opinion:

"These conditions would have pushed the fire back towards the river again during the morning whilst the afternoon direction would have pushed the fire towards the Property [the appellant's land]. This would be reason for the owner of the Property to closely monitor the progress of the fire."

[37] Information from the Bureau of Meteorology's Climate Archive gave the following information concerning the weather conditions that were recorded as having occurred on 9 September 1995 at Darwin Airport:

Time	Temperature	Wind Speed (KPH)	Wind Direction
3.00am	25.2	5	NE
6.00am	24.2	8	N
9.00am	27.4	13	N
12noon	30.5	18	NNW
3.00pm	30.9	21	N
6.00pm	27.7	18	WNW
9.00pm	26.5	9	W

[38] On 10 September 1995 the Bureau issued the following forecast to the Bushfires Council:

"Darwin Noon 3 pm
Max Temp : 30 31
Wind KPH : 330/20 NNW 340/20 NNW
Max Gust : 30 30
Min RH % : 59 52
FDI : HIGH 9 HIGH 10
Weather : Fine."

[39] In the opinion of Mr Whatley, the forecast for 10 September 1995 indicated mild winds with no change in the afternoon. He described the FDR and FDI as high 9 at noon and high 10 at 3pm. He described the conditions as ideal for a controlled burn because of the high relative humidity, a relatively low FDI and a light wind from a constant direction. Mr Whatley said the wind direction being from the north west, a controlled burn from the northern boundary of the appellant's land into Crown land to the north would have been undertaken against the wind which is not unusual in the case of back burning into an oncoming fire. In Mr Whatley's opinion, he would expect the owner of the land "to have been concerned if the fire was coming towards the property".

[40] The Bureau archives record the following statistics for the weather at Darwin airport as it occurred on 10 September 1995:

Time	Temperature	Wind Speed (KPH)	Wind Direction
3.00am	26.2	9	NW
6.00am	25.4	5	NNE
9.00am	28	17	NNE
12.00noon	30.8	13	N
3.00pm	32.5	21	N
6.00pm	31.2	22	NE

Firebreaks

[41] As mentioned, the first head of duty advanced by the appellant was based upon the proposition that the respondent was under a duty to implement and maintain firebreaks and to reduce the build up of fuel on Crown land to the north of the appellant's land. The appellant had constructed a firebreak along the northern boundary of his property, but there never had been a firebreak along the adjoining southern boundary of Crown land to the north of the appellant's property.

[42] The trial Judge found that the term "firebreak" is a misnomer and that a more correct description would be a "fire access trial". His Honour's finding was as follows:

> "The purpose of firebreaks is not so much to prevent fires entering a property (except, perhaps, small fires and those occurring in the early part of the dry season) but rather to provide access to those who wish to fight or manage an oncoming fire."

[43] Both Dr Russel-Smith, a consultant fire ecologist employed by the Bushfires Council, and Mr Bird agreed that "firebreaks" are inadequate barriers to bushfires. The trial Judge noted that when Mr Bird was asked whether the presence of a firebreak on Crown land together with that on Section 1746 would have stopped the fire in question, Mr Bird agreed "It was highly unlikely".

[44] Having found, correctly in my view, that the presence of such a firebreak would not have prevented the fire from entering Section 1746, the trial

Judge rightly concluded that the presence or absence of a firebreak on the boundary of the Crown land immediately adjoining the northern boundary of Sections 1746 and 1747 was not of any relevance. It follows from the evidence and his Honour's findings that the duty owed by the respondent to the appellant did not extend to the construction of a firebreak along the southern boundary of the Crown land immediately adjoining the northern boundary of Sections 1746 and 1747. Even if such a duty existed, the appellant failed to establish that the breach of duty in failing to construct a firebreak has caused any of the damage sustained by the appellant.

Fuel Reduction

[45] The trial Judge found that in years preceding 1995 the respondent had reduced the available fuel on Crown land immediately to the north of Section 1746 by either back burning into oncoming fires or by the use of controlled fires. His Honour accepted that controlled burning is an important management tool.

[46] The trial Judge determined that any fuel reduction prior to the fire would not have saved the house on Section 1746 because fuel reduction had not been carried out on Section 1746 during 1995. His Honour found:

> "Once the fire reached the northern border of that section [1746] (which is some distance from the house) it would have had the fuel available to it to pick up intensity and proceed as it did."

[47] After referring to the evidence of Dr Russell-Smith and Mr Bird, the trial Judge concluded that the appellant had not established that any action on the

part of the respondent to reduce the availability of fuel to the north of Sections 1746 and 1747 would have prevented the fire from entering Section 1746. His Honour found:

> "In all probability the fire would have followed the same path, driven by the same winds and, once on Section 1746, have achieved the same or a similar intensity before reaching the house even if fuel loads had been reduced to the north of Section 1746."

[48] The findings of the trial Judge were open to him on the evidence. His Honour did not expressly address the question of the respondent's duty with regard to reducing fuel load, but it follows from his findings that such action would have been ineffective. In the circumstances the respondent's duty did not extend to taking such ineffective action. Even if it is assumed that the duty of the respondent to the appellant extended to reducing fuel build up and that the respondent did not fulfil that duty, the case for the appellant could not succeed because the appellant failed to establish the necessary causative connection between the breach of duty and the damage sustained by the appellant.

Advising/Warning the Appellant of the Fire

[49] As to the second head of the respondent's duty, the appellant first asserted that the respondent was under a duty to advise or warn the appellant about the location and movement of the fire. The trial Judge dealt briefly with this issue finding that the appellant was aware of the location of the fire having paid particular attention to its location on the morning of 10 September 1995.

[50] The circumstances confronting the respondent may be summarised as follows. A substantial fire was burning in inaccessible terrain at an unknown distance to the north of the appellant's land. The prevailing weather conditions were likely to push the fire in the direction of the appellant's land. On the morning of Sunday 10 September 1995, therefore, a significant risk existed that the uncontrolled fire would move in the direction of the appellant's land and cross from the Crown land onto the appellant's land. The respondent was well aware that if the fire escaped from Crown land onto Section 1746 there was a significant risk that it would damage the appellant's house.

[51] In those circumstances, in my opinion the respondent's duty extended to ensuring that the appellant was aware of the fire and of the risk that it could move in the direction of the appellant's land.

[52] Through Mr Baxter the respondent discharged the duty to ensure that the appellant was aware of the existence of the fire and of the risk that it could move in the direction of the plaintiff's land. To the extent that the duty extended to advising the plaintiff of the movement of the fire, the content of that particular duty is necessarily linked with the issue of a duty to monitor the progress of the fire to which I now turn.

Monitoring Progress

[53] In the circumstances summarised in para [50], in my opinion the duty to take reasonable steps to prevent the escape of the fire from Crown land onto

Section 1746 plainly included a duty to monitor the course of the fire in order to be in a position to take reasonable steps to prevent the escape. In my view, however, the respondent's duty did not extend to taking steps to extinguish or restrain the spread of the fire while it was burning in inaccessible terrain well to the north of Section 1746. As appears later in these reasons, the only reasonable action that the respondent could have taken to extinguish or restrain the spread of the fire was to back burn into the fire at a time when it was approaching the northern boundary of Section 1746 and proximate to it. It was necessary, therefore, for the respondent to take reasonable steps to ensure that it was in a position to become aware of the approach of the fire in sufficient time to undertake the back burning operation.

[54] The question thus becomes whether the appellant established that the respondent failed to take reasonable steps to monitor the course of the fire and thereby to put the respondent in a position to undertake the back burning operation.

[55] On 9 September 1995 Mr Baxter and others took steps to ascertain the locality of the fire and were satisfied that it was in vacant and inaccessible Crown land well to the north of the appellant's property. Mr Baxter attended at Section 1746 on 9 September and at Section 1742 at about midday on 10 September 1995. On both occasions he made a judgement, with which the appellant agreed, that the fire did not pose an immediate threat to the appellant's property. The judgment made on 9 September

proved to be correct. The judgment made on 10 September proved to be incorrect, but the fact of the incorrect judgment in itself does not prove that the respondent was in breach of any duty owed to the appellant with respect to monitoring the progress of the fire and informing the appellant of the location and movement of the fire.

[56] As mentioned, the trial Judge found that the last occasion Mr Baxter observed the fire prior to the appellant's house being destroyed was from Section 1742 at about midday in the company of the appellant. His Honour found that the fire was then well to the north of Section 1746 and neither Mr Baxter nor the appellant thought that the fire posed a threat to Section 1746. His Honour also found that after that last observation, both the appellant and Mr Baxter expected the appellant to maintain a watch on the fire.

[57] In the context of those findings, and in considering whether the respondent could discharge its duty to monitor the progress of the fire by relying upon the appellant to make observations after midday, the trial Judge correctly had regard to the existing practices and community expectations with respect to bushfires in rural areas outside Darwin. His Honour summarised the regime for dealing with such fires in the following terms:

> "[53] In 1995 there existed a regime for dealing with bushfires in the rural areas outside Darwin. The Bushfires Council had been established as a land management organisation. The Bushfires Council employed regional fire control officers whose duties included co-ordinating the activities of the various Volunteer Bushfire Brigades in the region, advising landholders on fire

prevention activities and overseeing suppression activities where bushfires occurred. The rural area was divided into various regions and the Volunteer Bushfire Brigades had responsibilities for areas within those regions. The land on which the plaintiff and his family lived was not within the boundaries of a gazetted Volunteer Bushfire Brigade area.

[54] The plaintiff agreed that fire management in rural localities depended upon residents maintaining a high level of awareness of the risk of fire and conducting themselves in a co-operative way with the Bushfires Council and any relevant Volunteer Bushfire to limit and meet that risk. In effect, the Volunteer Bushfire Brigade relied upon the information fed to it by rural property owners, residents and the general public in order to maintain an effective fire service. The plaintiff himself gave evidence that he was alert to the threat arising from bushfires and he and his family were vigilant in this regard and co-operated with the Bushfire Brigade.

[55] The evidence of Mr Baxter, which was not challenged, was:

> "A fire burning in the vacant Crown land in that area would be left to burn unless if appeared likely to burn back towards the property or other properties in the vicinity. The landholder is in the best position to make that judgment and call for assistance from the fire brigade if necessary. That has been the customary approach taken to fires burning in a large area of vacant Crown land such as this. The Volunteer Bushfire Brigades in the vicinity are on call if assistance is required by landholders, but most attend to other tasks in their own and neighbouring brigade areas, and cannot be in constant attendance at a fire which is not considered an immediate threat to life or property."

[58] In the context of community expectations, the trial Judge also had the evidence of Mr Whatley when asked to comment on the suggestion that the landowner should be relieved of any obligation to be on watch and to call for assistance:

> "Bushfire Councils, is by a voluntary brigade, are community-based organisations, right, they're formed on the behest of the community,

> they receive a small amount of funding, it's basically a getting together of landowners to formalise what may have been existing – relationship within the community, they formalise those relations on the – applying to us to become a volunteer bushfire brigade and recognised by Government, given a small amount of funding and a couple of Toyotas. The onus is always on the landowner. It is the landowner's responsibility to fire manage from their block. People choose to live in these areas, they choose to make the distinction between having a fully paid fire service, that press with a triple O on your phone, you'll have lights and sirens come flying down the road and do whatever you do and they'll take the responsibility away from you. In our area they have to have the responsibility, they have to understand the nature of where they live and the fact that fire is part of the natural environment, and at some time quite often, if it's not "if", it's "when" you're going to have to experience it and that's a simple fact of life. If you want a fully paid fire service then live in Darwin."

[59] The relevance of the regime and community expectations in connection with bushfires in rural areas is, with respect, well explained by the remarks of McHugh J in *Dovuro Pty Limited v Wilkins & Others* (2003) 215 CLR 317 at 329 [34]:

> "If negligence law is to serve any useful social purpose, it must ordinarily reflect the foresight, reactions and conduct of ordinary members of the community or, in cases of expertise, of the experts in that particular community. To hold defendants to standards of conduct that do not reflect the common experience of the relevant community can only bring the law of negligence, and with it the administration of justice, into disrepute. That is not to say that a defendant will always escape liability by proving that his or her conduct was in accord with common practice. From time to time cases will arise where, despite the common practice in a field of endeavour, a reasonable person in the defendant's position would have foreseen and taken steps to eliminate or reduce the risk that caused harm to the plaintiff. But before holding a defendant negligent even though that person has complied with common practice, the tribunal of fact had better first make certain that it has not used hindsight to find negligence. Compliance with common practice is powerful, but not decisive, evidence that the defendant did not act negligently. And the evidentiary presumption that arises from complying with common practice should be displaced only where

> thee is a persuasive reason for concluding that the common practice of the field of activity fell short of what reasonable care required."

[60] In the context of his findings that at midday neither Mr Baxter nor the appellant thought the fire posed a threat to Section 1746 and thereafter both expected the appellant to maintain a watch on the fire, and against the background of his finding concerning the regime for dealing with bushfires in rural areas outside Darwin to which I have referred, the ultimate conclusion of the trial Judge is found in the following passage:

> "[56] The real issue in this case is who should have monitored the fire so that the path of the fire could be known and a back-burn conducted at an appropriate time. In the circumstances responsibility rested solely with the plaintiff."

[61] With respect, expressing the real issue in terms of who should have monitored the fire has the potential to divert attention from the fundamental questions to be addressed. The respondent was under a duty of care to take reasonable precautions to prevent the fire on its land from escaping onto the appellant's land and causing damage on that land. The critical questions for the trial Judge were whether, in the particular circumstances, that duty extended to monitoring the course of the fire and, if it did, whether the respondent discharged that duty. In particular, on the assumption that the duty extended to monitoring, the critical question was whether the respondent discharged that duty by the attendances of Mr Baxter at Sections 1746 and 1742 and by reaching agreement with the appellant that he would monitor the course of the fire and seek the assistance of the fire brigade

should the course of the fire pose an imminent risk of danger to the appellant's property.

[62] Although the trial Judge expressed his finding in terms that the responsibility for monitoring the fire after midday on 10 September 1995 "rested solely with the plaintiff", in substance his Honour found that Mr Baxter having made the inspection at about midday on 10 September and having reached agreement with the appellant that the appellant would thereafter monitor the fire and call for assistance if necessary, the content of the duty owed by the respondent to the appellant did not extend to taking active steps to monitor the course of the fire after midday on 10 September.

[63] There is no doubt that there were alternatives available to the respondent. For example, a person could have been placed on the northern boundary of Section 1746 to keep constant watch. However, the fact that alternatives were available does not automatically lead to a finding that in failing to pursue those alternatives, the respondent was in breach of its duty to the appellant. In this context, it is appropriate to bear in mind the following observations of McHugh J in *Dovuro* [38]:

> "A defendant is not negligent merely because it fails to take an alternative course of conduct that would have eliminated the risk of damage. The plaintiff must show that the defendant was not acting reasonably in failing to take that course. If *inaction* is a course reasonably open to the defendant, the plaintiff fails to prove negligence even if there were alternatives open to the defendant that would have eliminated the risk."

[64] In the context of inaction to the extent of not making personal observations after midday and relying upon observations by the plaintiff, it is also appropriate to bear in mind the findings of the trial Judge as to the plaintiff's experience with bush fires. His Honour found as follows:

> "[19] The plaintiff had lived in the area for many years. Bush fires were an annual occurrence on Crown land throughout the Northern Territory including within the area in which the plaintiff and his family lived. The area beyond where the family lived was remote, uninhabited and generally inaccessible for fire prevention or control purposes. The plaintiff was thoroughly familiar with the land, the direction of prevailing winds at that time of the year and the dangers posed by bush fires. On the basis of his assessment, conducted on the morning of 10 September 1995, there was no need to call for assistance."

[65] It must be emphasised that the content of the duty owed by the respondent to the appellant must be determined by reference to the circumstances in which that duty existed. For example, the content of the duty with respect to a fire in readily accessible terrain which is immediately threatening damage to property or persons will be significantly different from the content of the duty with respect to a fire burning in inaccessible terrain surrounded by uninhabited land.

[66] In addition, the content of the duty does not remain static. That content will change as the circumstances change. The escape of the fire onto the appellant's land having occurred at about 3pm, the critical questions to be determined are the content of the duty in the particular circumstances that existed during the hours leading to 3pm and whether the respondent discharged that duty.

[67] On 9 September 1995 Mr Baxter and the appellant made observations from the house on Section 1746. Their judgment that, at that time, the fire did not pose an immediate danger to the appellant's land and house was correct. Against that background, Mr Baxter and the appellant both agreed at midday on 10 September that the fire did not pose a danger to the appellant's land and house. Their observations were made from the stables near the southern boundary of Section 1742. Perhaps it would have been preferable for Mr Baxter to have made those observations from Section 1746, but there was no evidence that he would have obtained a better view or impression of the location of the fire by viewing the smoke from Section 1746. Much depends upon the nature of the terrain and growth of trees.

[68] Mr Baxter and others had been monitoring the course of a fire to the south of Section 1742 and to the north of Cox Peninsula Road. When the danger posed by that fire had passed, Mr Baxter specifically turned his attention to the fire to the north of Section 1746. He took time to attend on the appellant and seek the view of the appellant. In the light of the community practice and expectations, and bearing in mind the experience of the appellant, in arriving at his judgment Mr Baxter was entitled to take into account the views of the appellant.

[69] In all the circumstances, although the judgment made by Mr Baxter at midday proved to be incorrect, in my opinion the plaintiff failed to establish that the respondent did not take reasonable steps to monitor the fire up to

and including the visit by Mr Baxter to Section 1742 at about midday on 10 September 1995.

[70] As to the content of the respondent's duty after midday on 10 September 1995, attention must be paid to the degree of risk that the fire would move toward and reach the northern boundary of Section 1746 and to the extent of the damage that might occur if the fire was not restrained or extinguished at the boundary. In addition, particular regard must be had to the remoteness of the locality, the community practice and expectations in such situations, the appellant's experience, the duties required of the resources available to the Crown and the limited nature of those resources, namely, the volunteer fire brigade. It is in that total context that this Court must be careful not to impose unreasonable expectations and unreasonable duties which are based more on hindsight and a lack of appreciation of the practicalities and difficulties that exist with fires in remote areas during the dry season than a realistic assessment of the care which a reasonably prudent person would exercise in these circumstances.

[71] If at midday an assessment had been made that there was in imminent risk of the fire reaching the northern boundary of Section 1746, it could have been said with considerable force that, absent other emergencies, the Crown through the fire brigade was under a duty to place itself on standby at the northern boundary in order to be in a position to back burn into the face of the approaching fire. However, such an assessment was not made. Rather,

the conclusion was drawn, and reasonably drawn, that at that time the fire did not pose a significant risk to the appellant's land.

[72] In some circumstances, the fact that within three hours the fire escaped onto the appellant's land and burnt his house would be sufficient to establish an absence of reasonable care on the part of Mr Baxter. However, in the particular circumstances of this fire, and bearing in mind that the appellant agreed with the judgment made by Mr Baxter, the fact of escape three hours later is not in itself sufficient to establish a lack of reasonable care by Mr Baxter.

[73] Taking a guide from the weather conditions at the Darwin airport, the temperature had only risen approximately two degrees between 9am and midday. The wind speed was approximately the same or a little less. At the Darwin airport the direction of the wind had moved from north northeast to north.

[74] Between midday and 3pm, the temperature increased at the Darwin airport by two point five degrees. The wind direction remained constant, but the speed of the wind increased from 13 kilometres per hour to 21 kilometres per hour. There is no evidence as to whether that was a gradual or sudden increase in speed. There is no evidence as to whether the changes at the Darwin airport were reflected by similar or different changes in the area of the fire and Section 1746.

[75] There is an absence of any evidence to demonstrate that Mr Baxter should have known there was an imminent or approaching danger at midday and ought to have taken immediate precautions. Similarly, there is an absence of evidence that it was unreasonable of Mr Baxter to defer further observations over the next few hours on the basis that the appellant would keep a lookout.

[76] In those circumstances, in my opinion the respondent's duty did not extend to placing someone on the northern boundary of Section 1746 at midday or in the next three hours before the escape of the fire onto the appellant's land. Counsel for the appellant was unable to suggest any other way in which the respondent could have maintained a closer watch on the fire in that period. The appellant failed to establish that the respondent was in breach of its duty.

[77] I have reached my view without regard to the agreement between Mr Baxter and the appellant that the appellant would monitor the course of the fire. In my opinion, the fact of that agreement adds weight to my conclusion.

[78] In principle, there is no reason why the respondent could not use the assistance of any person, including the appellant, in complying with its duty to take reasonable care to prevent the escape of the fire onto Section 1746. This is not a case in which the appellant relied upon the respondent to monitor the course of the fire in the few hours after midday. Nor did the respondent undertake to monitor the fire during that period. The appellant

did not suggest that any issue of a non-delegable duty arose. The respondent was not required to use a member of the fire brigade to keep an eye on the fire in the discharge of its duty. The appellant voluntarily undertook that task.

[79] I emphasise that I am not suggesting that in all circumstances the owner of land on which a fire exists will be able to discharge a duty owed to a neighbour to prevent the escape of the fire onto the neighbour's land by agreeing with the neighbour that the neighbour will keep an eye on the fire and call for assistance if necessary. Each case must be decided according to its particular circumstances.

[80] For the reasons I have explained, in my opinion the appellant failed to establish that in the particular circumstances that existed at about midday and thereafter on 10 September the respondent failed to exercise the care which a reasonably prudent person would have exercised in the circumstances.

Preventing Spread of Fire – Back Burning

[81] As to the appellant's case that the duty of the respondent to the appellant included a duty to attempt to control the fire before it reached the vicinity of the northern boundary of Sections 1746 and 1747, the trial Judge pointed out that the evidence of all relevant witnesses was that the fire was unable to be controlled when it was to the north of Section 1746. His Honour found the area was effectively inaccessible for fire management purposes and there

was no immediate threat to life or property. The issue about which there was significant dispute in the evidence was whether the respondent could or should have taken action to back burn along the southern boundary of the Crown land immediately adjacent to the northern boundary of Sections 1746 and 1747 either on 9 or 10 September 1995 before the fire was in the vicinity of the northern boundaries of Sections 1746 and 1747.

[82] It is sufficient to dispose of this basis of the appellant's claim by setting out the relevant passages of the judgment of the trial Judge. In essence the trial Judge concluded that the suggested measure of back burning at a time when the fire was not proximate to the northern boundary of Sections 1746 and 1747 would have been ineffective to prevent the spread of the fire onto the appellant's property when it eventually arrived and would have created additional danger to adjoining properties. In addition, such a back burn would have unnecessarily tied up resources that were required elsewhere. Those findings were well justified by the evidence. The relevant passages of the judgment are as follows:

> [40] "The way in which the fire may have been controlled was by back-burning from the firebreak on section 1746 and section 1747. Mr Bird was of the view that back-burning should have occurred at an early time and whilst the fire was some kilometres away. He said it may have required burning for a day or two days and that the fire would slowly burn into itself and self-extinguish. He was asked to consider the wind conditions in the hours preceding the fire approaching section 1746. It was suggested to him that starting a fire on such a relatively narrow front as was provided by the firebreaks along the boundary of sections 1746 and 1747, in circumstances where winds were, over the period, coming from different directions ranging from north-west to west, north-east to north and north-north-east and west-north-west, created a danger.

It was put that the fire resulting from any back-burning exercise may itself have changed directions and created dangers for properties further to the south-west and south-east of sections 1746 and 1747. Mr Bird acknowledged that the terrain on either side of sections 1747 and 1746 was largely inaccessible, but the thought that 4-wheel drive vehicles could get onto those properties to broaden the front of the back-burn. He said he was not suggesting that the vehicles would go "scrub-bashing off in the bush in the face of a fire" and that they would have to remain on a firebreak. This is to ignore the fact that the firebreak did not extend beyond the borders of sections 1746 and 1747. He said that to meet the risk of the fire escaping it would be necessary to have "more appliances, more men".

[41] The same proposition was put to Doctor Russell-Smith and he responded:

> "So the critical issue I think from my judgment in a professional sense is that if you are going to actually back-burn in these scenarios, you – the fire has almost got to be on the boundary. The timing is critical so that you can actually then use a back-burn that will go towards the other fire and then they will accelerate towards each other. There is no point in doing it, I would suggest, a week earlier in my assessment because then you could be burning out a whole stack of country unnecessarily."

[42] Dr Russell-Smith pointed out that if the prevailing winds were coming from the north and early back-burning occurred in the region then there would be no control over fires heading further south. He said there may be repercussions for other landholders and "you may cause more problems than you actually set out".

[43] Mr Whatley, who is a Regional Fire Control Officer with the Bushfires Council, said that he would not have started a back-burn at 6 o'clock on the morning of the fire. He explained his reasons as follows:

> "We wouldn't start a back-burn at 6 o'clock for the simple reason that you are going to have to tie up resources for the full day to conduct blackout once you have actually conducted the burn and by that I mean we have to go actually physically into the – into the scrub on the edge of the fire line that we

> have – the edge of the burn that we have initiated and extinguish everything and if that means we need to take a loader in there and flatten trees that are burning at the top or whatever then so be it but it's just – it ties up too many resources and in a situation where there is no access and apart from Mr Gardner's residence etcetera, etcetera out there. We have got to remember too that these brigades have their own gazetted area of responsibility and they are based on fairly well developed subdivisions so we can't afford to tie resources up on a –on an occupied bush block basically."

> [44] The difficulty is that the region is remote and largely inaccessible and the length of firebreak from which a back-burn to the north could take place was relatively narrow. In my view, in the conditions that prevailed, it is clear that the setting of an early back-burning fire would be likely to create a danger for other property to the south-east and south-west of sections 1746 and 1747. In addition an early back-burn would unnecessarily tie up resources that were required elsewhere. I accept the evidence of Dr Russell-Smith that whilst a back-burn would be the appropriate approach to such a fire, it would be necessary to leave it to a time when the approaching fire was much closer than suggested by Mr Bird. Indeed, at the time that Mr Bird suggested the back-burn should have occurred, the fire was located well to the north of section 1746 and it could not have been known whether it would at any time move to the south and, if it did, at what location. Mr Bird agreed that when the fire was situated on the northern parts of section 1826 it was not, at that time, a threat to any property."

[83] In essence, the suggested back burning before the fire was in the vicinity of the northern boundary of Sections 1746 and 1747 would not have been an effective method of preventing the spread of the fire and would have created other dangers. In those circumstances the respondent's duty did not include a duty to back burn at such a time.

[84] The evidence established, and the trial Judge found, that the spread of the fire onto Section 1746 could only have been prevented by extinguishing the fire. Extinguishment of the fire was only possible by burning back into the

fire as it approached the northern boundary of Sections 1746 and 1747. The respondent was ready and able to attempt such an operation, but it failed to do so because it was unaware that the fire was approaching the vicinity of the northern boundary of the appellant's property. For the reasons discussed, the failure of the respondent to be so aware was not caused by a lack of reasonable care on the part of the respondent.

Failure to Call Witnesses

[85] The appellant complains that the learned trial Judge failed to draw inferences adverse to the respondent by reason of the failure of the respondent to call three witnesses. In the written outline of submissions, the appellant submitted as follows:

> "It is simply submitted that the normal inference, (that the evidence of these witnesses would not have assisted the respondent's case), should have been taken in favour of the appellant, and such inference would outweigh any reliance that could be made upon the controversial evidence of Mr Baxter. The findings of the Court miscarried as a result."

[86] Three witnesses were involved. First, Mr Rick Greaves who was with other members of the fire brigade when observations of the position of the fire were made on 9 September 1995. There is no evidence that Mr Greaves was present on any other relevant occasion. The observations of the officers on 9 September were not controversial. There was no challenge to the evidence of the officers who made the observations.

[87] The second person not called was Mr Roger Drummond. According to the affidavit of Mr Bruce Greaves, Mr Drummond accompanied Mr Greaves on the morning of 10 September 1995 when monitoring the fire to the north of Cox Peninsular Road and to the south of Section 1742. Mr Greaves said that after the monitoring he and Mr Drummond returned to their fire station. There was no cross-examination of Mr Greaves about this issue.

[88] As with Mr Rick Greaves, counsel for the appellant was unable to identify the particular matters about which Mr Drummond might have given evidence and which might have been adverse to the respondent's case. I am unable to discern any basis upon which a reasonable conclusion could be drawn that Mr Drummond would not have assisted the respondent's case or would have given evidence which impacted adversely upon the evidence of Mr Baxter.

[89] The third person was Mr Rod Cantlay. In June 1996 he was the Promotion Policy and Training Officer at the Bushfires Council. Neither in written or oral submissions did counsel for the appellant explain how the evidence of Mr Cantlay could have been of relevance.

[90] In a written summary, the respondent identified a controversy at trial concerning different copies of a report prepared by Mr Baxter for the Bushfires Council. The original file of the Bushfires Council was produced. It appears that at some stage Mr Cantlay sent a number of documents to Mr Bird by facsimile. Inspection of the file apparently satisfied counsel for the appellant at trial who indicated that the matter had been clarified.

Although counsel subsequently foreshadowed a *Jones v Dunkel* submission and made reference to this issue in written submissions to the trial Judge, the written submissions did not explain the basis of the contentions and no reference was made to the issue in the final address.

[91] Counsel for the appellant as unable to demonstrate any basis upon which the trial Judge should have drawn an inference adverse to the respondent. Nor did counsel advance any basis upon which it could reasonably be concluded that the evidence of Mr Cantlay might have damaged the credibility of Mr Baxter.

[92] The complaint relating to the failure of the respondent to call witnesses is without substance.

Conclusion

[93] At trial an issue arose as to whether the appellant had standing to pursue the proceedings without joining his fellow tenants. The trial Judge found that the plaintiff did not have standing to pursue a claim relating to buildings on the appellant's land.

[94] In view of the conclusion I have reached, and bearing in mind that the issue of standing relates only to damages, it is unnecessary for me to deal with this issue. Similarly, it is unnecessary to deal with the submission of the respondent that the appellant could not recover damages because the buildings on the land were illegal structures.

[95] The trial Judge did not deal with damages nor with the respondent's plea that any award should be reduced by reason of the appellant's contributory negligence. It is not appropriate for this Court to consider these questions.

[96] The appeal should be dismissed.

Angel J:

[97] I agree with the Chief Justice that the appellant at trial failed to prove a breach of duty by the respondent.

[98] I would only add that even if the respondent did breach its duty of care to the appellant the appellant failed to establish the house and contents, shed and bore were damaged as a consequence.

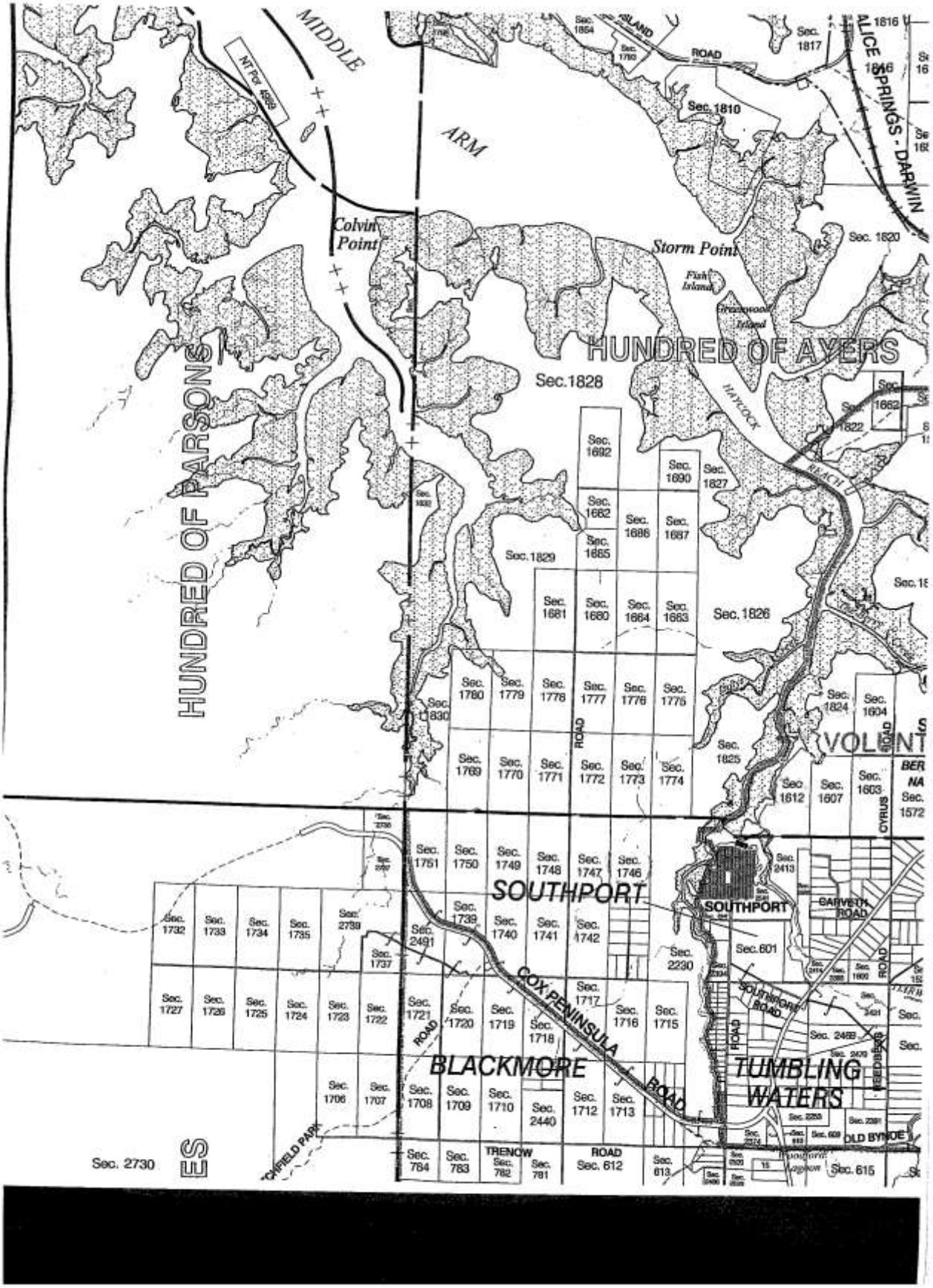
[99] The evidence failed to establish that fire fighting resources were available such to conduct an effective defensive back–burn at the critical time the fire on the Crown land approached the northern boundaries of Sections 1746 and 1747. A defensive back–burn could only be conducted from along the fire break adjacent to the northern boundary of Sections 1746 and 1747 and the eastern boundary of Section 1746. The appellant failed to establish that in the prevailing conditions, had such a back–burn been conducted, more probably than not the house and contents, shed and bore would have been saved. The fuel loads of Sections 1746 and 1747, the remote and largely inaccessible area of the narrow fire break from which a back–burn to the north of Section 1746 could be implemented, the weather conditions at the time and the need for critical timing of such a back–burn all militated

against success. The appellant's difficulties of proof were compounded by the circumstance that it remains unclear whether the house was burnt from the north, from the west via Section 1747, from east, or from some combination thereof.

[100] I agree that the appeal should be dismissed.

Mildren J:

[101] I agree with the judgment of the Chief Justice.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SOUTHPORT
BLACKMORE
TUMBLING WATERS
COX PENINSULA ROAD
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